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IN THE

Supreme Court of the United States

October Term, 1945

No. 1123

JOHN M. HARTZBERG and LOUIS HARTZBERG, co-partners doing business under the firm name and style of J. & L. HARTZBERG,

Petitioners,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

PETITIONERS' REPLY BRIEF

HENRY H. SHEPARD,
JOSEPH M. PROSKAUER,
Counsel for John M. Hartzberg and Louis Hartzberg, copartners doing business under the firm name and style of J. & L. HARTZBERG,
Petitioners.

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THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

REPLY BRIEF ON BEHALF OF J. & L. HARTZBERG, PETITIONERS.

1. The respondent contends that petitioners are precluded from questioning here the finding of the State Court that interstate transportation had begun (R. 36).

Unless the fact of delivery to the baggage room with an undisclosed intention thereafter to enter into a contract of carriage is evidence from which the beginning of interstate transportation can be inferred, there is no evidence to support the court's finding that such transportation had begun. It is undisputed that, in fact, no such contract was ever made, the intention neither having been disclosed to respondent nor carried out.

Petitioners urge as a matter of law that such transportation does not begin until at least a contract of carriage has been made.

The cases cited at the top of page 7 of respondent's opposing brief show that property is neither delivered to nor received by a carrier as such for transportation unless the destination thereof and instructions to transport to said destination have been disclosed to the carrier and the carrier has expressly or impliedly undertaken to transport the property to its destination without further instructions. In *Blossom* v. *Griffin,* 13 N. Y. 573, cited by respondent, the Court held that property was "received for transportation" by the carrier, "if the deposit of the goods in the warehouse is a mere accessory to the carriage, in other words, if they are deposited for the purpose of being carried without further orders." In that case, the property, when received by the carrier, had the destination marked thereon, and expressed on the carrier's receipt, according to a general arrangement previously entered into between the parties. In *Ladue* v. *Griffith,* 25 N. Y. 364, cited by respondent, the Court held that property was "delivered for transportation" when it was delivered on board the carrier marked and consigned to a disclosed destination. In *Witbeck* v. *Holland,* 45 N. Y. 13, cited by respondent, the carrier's receipt disclosed the identity of the consignee and the destination of the property. In *Rogers* v. *Wheeler,* 52 N. Y. 261, cited by respondent, the bill of lading contained the name and address of the consignees, and the Court held that receipt of the property by a carrier with such knowledge shows that it was received as carrier for carriage to the destination disclosed, no further orders being required. *In Coyle* v. *Western R. R. Corp.,* 47 Barb. 153, the barrels were directed to a person residing in a city upon the railroad, and the shipper gave the railroad an order for its transporation to such person. Accordingly, the Court held that the railroad assumed the relation of carrier from the time of acceptance of the shipper's order for transportation. To the same effect is *Wade* v. *Wheeler,* 3 Lans. 201, affirmed 47 N. Y. 658.

When petitioners' trunk was delivered to respondent's station, it was consigned only to the station by the transfer company's claim check attached thereto (Petitioners' Exhibit 10, R. 335). Respondent's receipt therefor issued to the transfer company (Petitioners' Exhibit 14, R. 338) recited as the only destination of the trunk the very station at which it was received. Concededly respondent had no knowledge or notice of any other contemplated destination or of any fact with respect to the trunk other than "that the trunk had come from the Statler Hotel" (Respondent's brief, p. 8), and that it was subject to transfer company claim check No. 7318. In such a case, it cannot be urged that the carrier had received the trunk for interstate transportation or that the trunk was delivered to the baggage room for transportation in interstate commerce from Detroit, Michigan to Cleveland, Ohio, as baggage upon a passenger ticket which had been reserved for the holder of the claim check, despite the inchoate expectation of the holder of such check. The so-called finding of the State Court to the contrary is without support in the record or in law. It must be disregarded by this Court upon a proper analysis of the facts. *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 659. See also, *Southern Pacific Co.* v. *State of Arizona,* 325 U. S. 761, 771; *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 593; *Postal Telegraph Cable Co.* v. *Newport,* 247 U. S. 464, 473.

2. Federal questions are involved:

(a) The extent to which Congress has legislated as to a matter which would otherwise be governed by State law;

(b) If Congress has legislated as to the facts at bar, the proper construction of such legislation as applied to those facts.

These questions may not be determined solely by the character of the commerce—interstate or intrastate—as claimed by respondent (Respondent's brief, p. 6).

3. *B. & O. S. W. R. R. Co.* v. *Settle,* 260 U. S. 166, 171, and *Atlantic Coast Line R. R. Co.* v. *Standard Oil Co.,* 275 U. S. 257, 268, do not hold that interstate transportation begins because of a prospective shipper's inchoate expectation.

The question there was whether property shipped from a point of origin in one state to a point in a second state, and then reshipped to a point of destination in the second state, was subject to the lawful interstate rate applicable to shipments from point of origin to point of destination or subject to the combination of the interstate rate to the point of reshipment and the local rate from the point of reshipment to destination, when it was intended at the point of origin that the property would be shipped in this manner to the point of destination to evade payment of the lawful through rate. In those cases, the Court held that the completed shipment was a through shipment, despite the separate contracts made, if it was so intended by the shipper, and *if such intention was in fact carried out.* In those cases, there was no element of frustrated purpose, or of the progress of "clearly defined plans" having been "aborted" by any intervening theft (R. 34). As this Court stated (260 U. S. 166 at p. 171):

> "* * * *the original intention persisted in was carried out.* * * * Under these circumstances, *the intention as it was carried out determined, as matter of law, the essential nature of the movement;* and hence that the movement through to Madisonville was an interstate shipment." (Italics supplied.)

And at pages 172 and 173 (260 U. S.) it appears that "The sole question, therefore, which could arise in this case,

was whether the movement actually entered upon at point of origin, and *persisted in,* was transportation of the lumber to Madisonville'' ''The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began * * *. The distinction is clear between the cases of that character and the one at bar, where the essential nature of the traffic as a through movement to the point of ultimate destination is shown by the *original and persisting intention of the shippers which was carried out.''* (Italics supplied.)

Mere intent that property delivered to a carrier's depot was to be destined to a point outside the state does not place such property in interstate transportation or even in interstate commerce unless and until the contemplated interstate movement actually takes place. *Oregon-Washington R. R. & Nav. Co.* v. *Strauss* & Co., 73 F. 2d 912, 915; *Oregon-Washington R. R. & Nav. Co.* v. *Farmers Nat. G. Corp.,* 25 F. Supp. 667; *Hughes Bros. Timber Co.* v. *Minnesota,* 272 U. S. 469, 475; *Minnesota* v. *Blasius,* 290 U. S. 1, 9. Transportation which, isolatedly considered, takes place wholly within a state, is not to be deemed part of interstate commerce because the shipper, unknown to the carrier, contemplated a subsequent movement of the same traffic to a point outside of the state, when such contemplated subsequent movement never takes place, and is never arranged for with or disclosed to the carrier. See *Davis* v. *Phillips,* 27 Ga. App. 814, 109 S. E. 924. A case in point is *Federal Compress Co.* v. *McLean,* 291 U. S. 17. By agreement, the appellant's warehouse was used by a railroad as its cotton depot, and the appellant was designated as the agent of the railroad to receive the cotton from prospective shippers, store, compress, and bale, and load and unload the cotton upon and from its cars. Upon delivery of cotton to it,

appellant issued its negotiable warehouse receipts. The right to demand delivery of the cotton or otherwise control its disposition was reserved to the holders of the receipts. Upon shipping orders being given by the holders of the receipts, appellant compressed and baled the cotton and delivered the bales to the rail carrier for interstate shipment. The movement of the cotton out of the warehouse was directed by the holders of the receipts. Its destination was not determined until the owner gave shipping instructions to appellant and shipment was not made until surrender of the warehouse receipts. The compress charges were paid by the carrier, and added to the charge for carriage, and in the case of cotton brought to the warehouse by rail carriage, the through interstate rail rate was applied from the point of origin to destination instead of the combination rate. This Court said (p. 21):

> "It is clear that by all accepted tests the cotton while in appellant's warehouse, has not begun to move in interstate commerce. * * * When it comes to rest there, its intrastate journey, whether by truck or by rail, comes to an end, and although in the ordinary course of business the cotton would ultimately reach points outside the state, its journey interstate does not begin * * * until its shipment to points of destination outside the state. Before shipping orders are given, it has no ascertainable destination without the state, and in the meantime, until surrender of the warehouse receipts, it is subject to the exclusive control of the owner."

Penna. R. R. Co. v. *Pub. Utilities Com. of Ohio,* 298 U. S. 170, 175, cited at page 7 of respondent's brief, does not hold to the contrary.

4. The cases of *Culbreth* v. *Martin,* et al., 179 N. C. 678, 103 S. E. 374; *Boston & Maine R. R.* v. *Hooker,* 233

U. S. 97; and *Galveston Ry. Co.* v. *Woodbury,* 254 U. S. 357, relied upon by respondent, do not dispose of the questions raised here. In the *Martin* case, the defendant was the Director General of Railroads, who operated the railroad involved under federal control. Liability in such case was subject to Federal Law and the tariffs filed with the Interstate Commerce Commission, even in instances where such liability would have been subject to State law but for the fact of such Federal control (see: *Missouri P. R. Co.* v. *Boone,* 270 U. S. 466; *Lancaster* v. *Smith* [Tex. Civ. App.] 244 S. W. 1076). In the *Hooker* case there was no holding that a carrier's rule limiting its liability unless a higher value was declared and charges paid "at the time of delivery" (Respondent's brief, p. 9) was lawful and just. The rule there approved is set forth in the opinion (233 U. S. 97) at page 124 as follows:

> "'Baggage liability is limited to personal baggage not to exceed one hundred dollars in value * * * unless a greater value is declared and stipulated by the owner and excess charges paid at *time of checking* the baggage;' * * * Plaintiff did not declare and stipulate *at the time the baggage was checked* that it exceeded $100 in value, and did not pay any charge for valuation in excess of that amount." (Italics supplied.)

So in the *Woodbury* case, plaintiff there "checked her trunk which she took with her." For failure to declare a higher value and pay excess charges when she checked her trunk, liability was limited.

5. The argument that full liability should be denied because the Act (49 U. S. C., Sec. 6 [7]) prohibits any privilege or facility in transportation of property except as are specified in the tariffs, is specious. This Court has imposed full liability where the tariff limitations were

held invalid or inapplicable. *Union Pacific R. R.* v. *Burke,* 255 U. S. 317, 321; *Boston & Maine R. R.* v. *Piper,* 246 U. S. 439; *Cincinnati &c Co.* v. *Rankin,* 241 U. S. 319. The attempted use of a similar argument to impose the tariffs filed with the Interstate Commerce Commission upon intrastate transactions has been rejected by this Court in the absence of a proper finding and order by the Interstate Commerce Commission. *Minnesota Rate Cases,* 230 U. S. 352, 419, 432-433; *Houston & Texas Railway* v. *United States,* 234 U. S. 342, 355-8. The only commission orders applying the respondent's tariff to intrastate transactions are those set forth at R. 365, with respect to New York and Ohio. No order is shown to have been made applicable to Michigan.

6. Respondent contends (Respondent's brief, p. 9) that Brodie's purchase of a ticket for transportation in interstate commerce and his delivery of the baggage to the respondent "without 'checking' " fixed the rights of the parties by law which imposed upon each of them the terms and conditions of the limited liability contract, and dissent from the limitation of liability by Brodie would have been immaterial. The only authority cited is *Western Union Tel. Co.* v. *Esteve Bros & Co.,* 256 U. S. 566, which relies on the *Hooker* case and the *Woodbury* case, both involving checked baggage. It is not the purchase of the ticket and delivery of the trunk *per se* which fixes the contract, but the acceptance and use of the ticket by checking the trunk thereon for transportation as baggage. *N. Y. Central &c R. R.* v. *Beaham,* 242 U. S. 148, 151. Upon such acceptance and use, Brodie would have been afforded an opportunity to dissent from the limitation by declaring a higher value, since, as respondent has conceded in the State Court, after Brodie had caused the transfer company to deliver the trunk to respondent "All that remained for Brodie to do was to appear at the Detroit station and exchange his transfer check for a railroad

check. At that time * * * he * * * could have declared in writing a greater value." Non-action prior to such acceptance and use could neither imply assent to nor preclude dissent from the asserted limitation.

7. There is no obvious propriety in the maximum limitation of the $2,500 valuation for a passenger's baggage (Respondent's brief, p. 10). The *Western Union* case (256 U. S. 566), relied upon by respondent, is not a valid precedent. It is a telegraph case, clearly distinguishable from a bailment or carrier case. It was so distinguished by this Court, which stated (256 U. S. at p. 574) that "It is by no means clear" that the rule of the *Burke* case, 255 U. S. 317 "established for common carriers of goods—should be applied to telegraph and cable companies", citing the *Primrose* case, 154 U. S. 1, 14. Since Brodie could not obtain full protection by declaring the full value of the contents of his trunk, $2,500 protection was as improvident, insufficient and inadequate as was $100 protection for property worth $169,078.47, and his intention, unknown to respondent, to declare only $100 was based on and compelled by respondent's illegal prohibition of declarations of value in excess of $2,500. Brodie's undisclosed intention based on this illegal rule is no defense to the respondent for its proclamation of such illegal rule. See *Borden* v. *New York Cent.* R. Co., 98 Misc. 574.

8. Respondent's brief (p. 4) makes reference to "the owner's acceptance of a receipt that the trunk was subject to tariff regulations with limited liability", which receipt, it is claimed, was "delivered to Brodie's agent (R. 206)" (Respondent's brief, p. 3). It is undisputed in the record that this receipt was delivered only to the transfer company's driver and retained by the transfer company as its permanent record (R. 295, 296, 359) and was never seen by Brodie. The transfer company's

driver was not Brodie's agent in this respect, and the statement in respondent's brief is incorrect. Brodie was not bound by any notation thereon, and no assent can be implied from the delivery thereof to and its retention by the transfer company. *Merriman* v. *The May Queen*, 17 Fed. Cas. 136; *Hill* v. *Adams Express Co.*, 77 N. J. L. 19; *New* v. *Chicago, Rock Island &c R. Co.*, 171 Ill. App. 488; *Grice* v. *Oregon-Washington R. & Navigation Co.*, 78 Or. 17, aff'd 78 Or. 17.

9. The arguments made by respondent confirm the existence of Federal questions of substance which, it is submitted, have been erroneously decided by the New York State Courts. Such questions are reviewable by this Court by certiorari under Section 237 (b) of the Judicial Code, as amended. *Mo. Pac. R. Co.* v. *Hartley Bros.*, 290 U. S. 576; *Chicago & N. W. Ry Co.* v. *Bolle*, 284 U. S. 74; *N. Y., N. H. & H. R. Co.* v. *Bezue*, 284 U. S. 415.

Conclusion

WHEREFORE, your petitioners pray that their petition for a writ of certiorari should be granted, and that the judgment entered in the Supreme Court of the State of New York, County of New York, should be reversed.

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May 15th, 1946.